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In The

Supreme Court of the United States

October Term, 1982

STATE OF NEVADA,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SIERRA CLUB AND FRIENDS OF THE EARTH

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BRIEF OF AMICI CURIAE SIERRA CLUB AND FRIENDS OF THE EARTH

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Sierra Club, founded in 1892, is a non-profit corporation devoted to the protection, preservation, and wise

[1]All of the parties have consented in writing to the participation of these *amici* pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of the United States of America.

management of natural resources. The Sierra Club, which has over 200,000 members including many Nevada residents, is committed to a sound water policy in the arid Western states that maximizes water conservation and eliminates the wasteful use of water.

The extraordinary beauty and magnificent wildlife population of Pyramid Lake have been matters of special concern to the Sierra Club for decades. We have advocated the stabilization of the surface level of Pyramid Lake, the diminution of dissolved solids in the lake, the maintenance of desirable spawning conditions in the Truckee River, the reestablishment of the spawning runs of the Lahontan Cut-throat Trout and cui-ui, and the protection of Pyramid Lake's cormorants and breeding colony of white pelicans. The Sierra Club has consistently opposed the current high levels of diversions of water from the Truckeee River to the Newlands project, which threaten to destroy Pyramid Lake and its wildlife habitat.

In 1971 the Sierra Club estab'ished its Pyramid Lake Task Force, an active citizen's organization to promote the preservation of Pyramid Lake. Among many other things the Sierra Club Pyramid Lake Task Force has published an extensive report on the state of Pyramid Lake.[2] The Report was compiled on a volunteer basis, with few if any expenses reimbursed, by approximately forty Sierra Club members, most of whom were professionals or advanced students in hydrology, fish and wildlife biology, physics, law, mathematics, and engineering. The comprehensive report, which required some 3,500 person-hours to complete

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[2]Sierra Club Pyramid Lake Task Force, Second Progress Report and Management Proposal (1975).

and which totalled 121 pages plus lengthy appendices, concluded that Pyramid Lake can yet be saved if wise hydrologic management practices are employed in order to produce sufficient flow from the Truckee River to permit spawning in the river and to dilute the high concentration of dissolved solids in the lake. The key to meeting our recommendations is the use of modern, economically feasible management practices to permit increased irrigation efficiency in the wasteful Newlands Project; to allow for conservation of water by other water users on the Carson and Truckee Rivers; and to eliminate the Lahontan Reservoir spills, precautionary drawdowns, and management errors that have discharged water wastefully into the Carson Sink.[3] If the Tribe's reserved water right is established and if these wasteful and inefficient irrigation practices are eliminated, agricultural production can continue and the death of Pyramid Lake can be prevented.

Friends of the Earth is a not-for-profit membership organization committed to the preservation, restoration, and rational use of our natural resources. Incorporated in New York, Friends of the Earth's principal place of business is at 1045 Sansome Street, San Francisco, California 94111, with major offices located in New York, Washington, D. C., and Seattle, Washington. Friends of the Earth's staff and members have conducted extensive research, participated in numerous meetings and administrative hearings, and testified before the United States Congress concerning the preservation of wildlife habitat. Friends of the Earth has more than 30,000 members in the United States, including many in the State of Nevada.

Water is a uniquely scarce and valuable resource in the Western United States. The policies that determine

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[3] E. g., *id.* at 82-87.

its distribution also determine the fate of the people and wildlife dependent on it. Friends of the Earth recognizes the environmental impact of water resource policy, and actively seeks policies that encourage conservation and preservation of wildlife habitats.

Friends of the Earth has always maintained that protection of wildlife is best achieved by preservation of habitat. Among the abundant wildlife of Pyramid Lake are the cui-ui, an endangered species, and the Lahontan Cut-throat Trout, a threatened species. Anaho Island, a National Wildlife Refuge, boasts the largest white pelican rookery in the United States. Because Pyramid Lake provides a unique habitat, and also because of the lake's integral role in the lives of the members of the Pyramid Lake Paiute Tribe, Friends of the Earth has a special interest in this litigation.

The positions set forth in this brief do not necessarily represent the views of any of the institutions at which counsel for *amici* are employed.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is balanced and fair, and should be affirmed. Indian law, trust law, res judicata, due process, and principles of judicial review in natural resources law all dictate that the Tribe's water rights and Pyramid Lake must be preserved unless a congressional statute or the *Orr Ditch* decree explicitly extinguished them. There was no such congressional or judicial action. Rights of this magnitude cannot be destroyed when both Congress and the courts are silent on the subject.

Several states and water resources interests in other regions of the West have raised policy considerations con-

cerning the impact of the Court of Appeals' decision. We respect these concerns but believe that they are overdrawn.

First, the administrative problems involved in recognizing this Tribe's water rights after the issuance of a general decree are similar to those caused by the recognition of many other kinds of inchoate rights that require western water administrators to update general stream adjudications regularly. Second, private water users can adjust to a decreed right in favor of the Tribe by abandoning wasteful, outmoded irrigation systems and by conserving water through the adoption of efficient, modern farming practices. By modernizing their operations, irrigators will bring themselves into conformance with a wide range of statutes and cases making it clear that there is no place for water waste in the American West today.

Finally, the decision of the Court of Appeals would have little, if any, impact beyond this litigation because the Court of Appeals' opinion on the res judicata issue is carefully limited to the facts of this case. Further, the ruling is inherently limited by historical developments: only a small number of other tribes could seek to bring themselves within the decision here because just a handful of existing adjudications have ever involved Indian water rights. These factors, and the inordinate impact on a complex and exquisite resource system, make for a decision hewing closely to its unique setting.

Thus this Court, like the Court of Appeals, can render a limited opinion that is consistent with the intent of Congress and the *Orr Ditch* decree; that protects the legitimate interests of the Tribe, state water administrators, and private water users; and that promotes sound state and federal water policy in the American West. Ultimately, this Court should be guided by other great re-

source cases involving trust relationships where prudential rules were employed to protect natural resources of national importance by recognizing the primacy of legislative decision-making. *E.g., United States v. California*, 332 U. S. 19 (1940); *Illinois Central Railroad v. Illinois*, 146 U. S. 387 (1892).

ARGUMENT

I. This Court should not permit the adjudication by silence of a resource of national significance.

If Pyramid Lake is to be preserved by this litigation it must be done through preservation of the water right possessed by the Pyramid Lake Paiute Tribe of Indians, whose reservation of land wholly encompasses the lake. The reservation was created in 1859 and confirmed by an 1874 executive order. This Court has recognized expansive water rights for executive order tribes.[4]

The premise of the arguments made by the parties opposing the Tribe here is that water rights for fisheries purposes, and Pyramid Lake itself, can be taken by silence, without any statement of such intent by either Congress or the courts. To be sure, federal officials may have acted purposefully, however improperly, toward that end by being advised of the Tribe's rights and failing to litigate them.[5] But in our judgment executive action not communicated to either the legislative or judicial branches, and not acted upon by either of them, is insufficient to support a result that would destroy the Tribe's water rights. All of the specific bodies of law involved here—Indian law, trust law, res judicata, due process, and natural resources

[4] *Arizona v. California*, 373 U. S. 546, 595-600 (1963). *See generally* F. Cohen, *Handbook of Federal Indian Law* 127-28 (1982 ed.).

[5] See 649 F. 2d at 1290-95.

law—require a more specific showing of intent than the record here can support.

Indian resource rights cannot be terminated by legislative and judicial silence. If special Indian rights are to be extinguished, it is Congress, not the executive branch acting alone, that has power to decide on such issues.[6] This Court has been resolute in requiring that judges act with great caution in concluding that Congress has in fact decided to terminate Indian rights: the legislative decision must be made openly and explicitly so that such sensitive issues will be subject to full and deliberate debate in Congress.[7] Such an approach guards against inadvertent loss of important Indian resource rights and assures that a decision has in fact been made by a body vested with the authority to decide.

The assumption that water rights for Pyramid Lake can be taken by silence is the basis of petitioners' argument below that congressional actions in 1902, 1904, and 1956 implicitly abrogated the Tribe's water rights. The Court of Appeals rejected each argument and did so correctly.[8] None of those laws or their legislative histories dealt with the Tribe's rights with specificity. In this context a congressional decision will not be implied.

The petitioners also argue that inaction by the District Court in the 1944 *Orr Ditch* decree operated to terminate the Tribe's water rights in the Truckee River. A number of different rules converge to prohibit inadvertent loss of these rights in court. The *Orr Ditch* proceeding

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[6]On Congress' broad authority in Indian affairs, *see, e. g., United States v. Antelope*, 430 U. S. 641 (1977); *Morton v. Mancari*, 417 U. S. 535 (1974); *McClanahan v. Arizona Tax Comm'n*, 411 U. S. 164 (1973).

[7]*E. g., Washington v. Fishing Vessel Ass'n*, 443 U. S. 658, 690 (1979).

[8]See 649 F. 2d at 1297-1300, 1311-12.

was a quiet title action, not a modern general stream adjudication. A proceeding in quiet title is less comprehensive than the modern procedure and there is authority that the *Orr Ditch* court had jurisdiction to rule only on property that had been specifically put at issue;[9] such reasoning would apply here since the *Orr Ditch* proceedings never dealt specifically with the reserved right for fisheries purposes. Similarly, res judicata is not invoked unless a litigant has been accorded "one full and fair opportunity for judicial resolution."[10] Further, the District Judge was put on notice of the Tribe's expansive reserved water right but failed to inquire of it on the record, error that may amount to a due process denial.[11]

The most flagrant acts of silence, however, were by government officials supposedly serving as the Tribe's representatives. The United States has the power under normal circumstances to represent Indian tribes in water adjudications and to bind Indian tribes,[12] but that general proposition does not obviate the high trust duty owed to Indians. Importantly, the trust here involves a specific *res*, a property right in water. When a clearly-defined Indian property right is involved and when representation has been undertaken unequivocally, this Court has held federal officials to a trust duty akin to that of a private trustee.[13] Under such circumstances, the Court of

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[9]See Brief of Cross-Petitioner, Pyramid Lake Paiute Tribe of Indians, pages 34-36.

[10]*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313, 324 (1971).

[11]See Brief of Cross-Petitioner, Pyramid Lake Paiute Tribe of Indians, pages 40-41.

[12]*Cf. Heckman v. United States*, 224 U. S. 413 (1912).

[13]In *Seminole Nation v. United States*, 316 U. S. 286 (1942), the Court relied upon Bogert, *Trusts and Trustees*, Scott, *Trusts*, and the *Restatement of the Law of Trusts*, and quoted from a

(Continued on next page)

Appeals reasonably applied private trust law directed toward protecting the property interests of beneficiaries against grossly inadequate or unfaithful trustees.[14] We also agree with the Tribe that such conduct by Federal officials fairly raises due process issues.[15] Any trustee—and especially this trustee—lacks the authority to deal away a beneficiary's 100-square mile-lake to more favored parties behind closed doors.

These due process and trust issues are highlighted by a comparison of the briefs of the State of Nevada and the Tribe. Both place their primary emphasis on the same line of facts in this extensive record: they rely on evidence that federal officials were repeatedly placed on notice of the importance of the Tribe's fishery right but that the issue was never explicitly raised in litigation.[16] The State, employing res judicata principles not involving the Indian trust duty, uses such facts to argue that the Interior Department was merely "representing diverse interests" in resolving a policy conflict.[17] The State's analysis would be appropriate if *public* lands were involved—if, say, Pyramid Lake were located on Bureau of Land Management lands and there were a conflict with a dam administered

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state court opinion on private trust law written by Justice Cardozo before he joined the Court: " 'Not honesty alone but the punctilio of an honor the most sensitive, is then the standard behavior. . . . Uncompromising rigidity has been the attitude of courts when petitioned to undermine the rule of individual loyalty by the "disintegrating erosion" of particular circumstances. . . .' " *Id.* at 297 n. 12. *See also, e. g., Navajo Tribe of Indians v. United States,* 364 F. 2d 320 (Ct. Cl. 1966).

[14]649 F. 2d at 1309-11.

[15]Brief of Cross-Petitioner Pyramid Lake Paiute Tribe of Indians, pages 37-43.

[16]Brief of Petitioner [State of Nevada], pages 8-19; Brief of Cross-Petitioner Pyramid Lake Pauite Tribe of Indians, pages 7-10.

[17]Brief of Petitioner [State of Nevada], page 23.

by the Bureau of Reclamation. That would be a matter of public policy involving the management of federal lands, where different views are held by two competing agencies.[18] This situation differs because a non-federal entity,[19] the Tribe, has an ownership interest in the affected land and water. It is not properly an in-house "reconciliation" because there is a duty to an entity outside of the Department of Interior, outside of the federal government. Unlike questions involving purely federal resources, decisions to abrogate Indian trust assets are not left to administrators acting alone but rather must be made expressly by Congress or by the courts, neither of which acted on the Tribe's water rights.

Pyramid Lake itself is relevant to the petitioners' arguments for destruction by silence. The presence of this unique resource is so palpable that neither Congress nor the *Orr Ditch* trial court logically could have intended to terminate this resource without mention of it. The lack of any reference, however oblique, to this particular lake is proof positive that neither Congress nor the court, the only entities with the power to order its destruction, intended to encompass the lake within their statutes or decrees, respectively. Pyramid Lake was outside of Congress' proceedings when it acted. Pyramid Lake had not been brought to the bar when the federal court rendered the *Orr Ditch* decree.

Today, statutes require that decisions involving our great resources be made openly.[20] Natural resources law

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[18] *Cf., United States v. Midwest Oil Co.*, 236 U. S. 459 (1915) (authority of executive to withdraw lands from mineral entry for conservation purposes).

[19] *United States v. Wheeler*, 435 U. S. 313, 328 (1978) (An Indian tribe is "an independent sovereign, . . . not . . . an arm of the Federal Government"). *See also Merrion v. Jicarilla Apache Tribe*, 102 S. Ct. 894 (1982).

[20] *E. g.*, National Environmental Policy Act of 1969, 42 U. S. C. § 4321-43.

had not developed to that extent in the early twentieth century. But other doctrines—from the bodies of law involving Indians, trusts, res judicata, and due process—all operate in this rare context to prohibit the destruction of these valuable resource rights by silence. By enforcing the central dictates of any or all of those varied bodies of law, this Court will also have fulfilled the central judicial function in natural resources law: to ensure that decisions on priceless resources of national importance will be made openly, on the record, and explicitly so that irrevocable mistakes with our nation's heritage will be minimized.[21]

II. State administrators and private water users can reasonably and equitably make the necessary adjustments to accommodate the ruling of the Court of Appeals.

A. General Stream Adjudications Often Do Not Adjudicate All Outstanding Rights and Must Be Updated By Administrators to Accommodate Inchoate Rights and New Uses.

Several states have participated as *amici* in support of the State of Nevada in order to offer their view of the disruptive effects on state water resources administration if the Court of Appeals' ruling is affirmed. The briefs emphasize the importance of settling all claims to water by means of general stream adjudications. For example, the brief of nine states asserts that "the only way to assure the effectiveness of [a general stream adjudication] is to join all potential claimants in a single action, re-

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[21]*See United States v. California*, 332 U. S. 19, 40 (1947) (Holding, in case involving the three-mile marginal belt along the California coast, that "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."); *Illinois Central Railroad v. Illinois*, 146 U. S. 387 (1892) (Discussed in Conclusion, *infra*). *See also* Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 Mich. L. Rev. 471, 559-60 (1968).

quire that such claimant assert all potential claims and require that all parties be bound by the result."[22] The point is made even more strenuously in the briefs of Idaho and Washington.[23] They argue that "a fundamental concept, important to this case, is that a general adjudication procedure contemplates that, after the entry of a final judgment, *the only rights remaining in existence* are those specified in that judgment. All other rights, even though they may have existed prior to the adjudication, are no longer valid."[24]

These arguments are overstated in some respects and in others are simply wrong. To be sure, the modern general stream adjudication represents a major advance in affording a procedural mechanism to bring multiple parties into court in order to resolve complex questions of interrelated priorities among large numbers of claimants within a given watershed.[25] The general adjudication, however, is just one of several elements of modern water administration, and does not afford the kind of perfect finality suggested by the states.

It is considerably off the mark to argue that any general adjudication sets out "the only rights remaining in existence" and that "all other rights . . . are no longer valid." There are numerous categories of inchoate rights

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[22]Brief of Amicus Curiae States of Arizona, California, Montana, North Dakota, Oregon, South Dakota, Texas, Utah, and Wyoming in support of Petitioner State of Nevada, page 2.

[23]Brief of Amici Curiae, State of Washington and State of Idaho, page 3.

[24]Brief of Amici Curiae, State of Washington and State of Idaho, page 3 (emphasis in original).

[25]On the inadequacy of prior procedures and the importance of the general stream adjudication as a reform measure, see 1 R. Clark, *Waters and Water Rights* 93-143 (1967); 2 W. Hutchins, *Water Rights Laws in the Nineteen Western States*, 444-470 (1974).

that are not resolved by general stream adjudications and that continue in existence in spite of a final decree.[26] Some examples are these:

(1) Subsequent interstate compacts supercede prior adjudications under state law;[27]

(2) Subsequent Supreme Court decisions decreeing equitable apportionment supercede state adjudications;[28]

(3) Obligations under Indian treaties, agreements, statutes, and executive orders remain in effect despite general adjudications if the tribes and the United States are not properly joined;[29]

(4) Obligations under international treaties override allocations made in general adjudications;[30]

(5) Federal non-Indian reserved rights are unaffected by state adjudications if the United States is not properly joined;[31]

(6) Extensive pueblo water rights are expanding rights not limited by general stream adjudications;[32]

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[26]*See generally* Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U. Cal. Davis L. Rev. 233, 234-236 (1980).

[27]*E. g., Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938); *Colorado* v. *New Mexico*, 103 S. Ct. 539 (1982).

[28]*Nebraska* v. *Wyoming*, 325 U. S. 589 (1945); *Wyoming* v *Colorado*, 259 U. S. 419 (1922).

[29]*See Arizona* v. *California*, 373 U. S. 546 (1963); *Winters* v. *United States*, 207 U. S. 564 (1908).

[30]*See* 2 R. Clark, *Waters and Water Rights*, §§ 105, 152.3 (1967).

[31]*Cappaert* v. *United States*, 426 U. S. 128 (1976); *United States* v. *New Mexico*, 438 U. S. 696 (1979). The existence of federal reserved water rights, however, is narrowly construed. *Id.*

[32]*City of Los Angeles* v. *City of San Fernando*, 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P. 2d 1250 (1975); *New Mexico* v. *Aamodt*, 537 F. 2d 1102 (10th Cir. 1976), *cert. denied*, 429 U. S. 1121 (1977).

(7) In some western states riparian rights co-exist with appropriative rights and can be expanded beyond the terms of a general stream adjudication;[33]

(8) The public trust doctrine may allow for instream flows even if not set out in a general stream adjudication;[34]

(9) The navigation servitude, under both state and federal law, is unaffected by a general adjudication;[35] and

(10) Rights set out in a decree are subject to subsequent regulation pursuant to the state police power.[36]

Rights established under general stream adjudications are constantly being revised in other respects. Rights are abandoned,[37] forfeited,[38] and transferred to new owners.[39] Changes in the kind of use[40] and the place of use[41] are continually made. State laws are evolving rapidly concerning difficult questions of how to regulate groundwater uses that affect decreed rights on surface streams, and vice versa.[42] Further, the rights on file fail to reflect what is actually happening on the ground. Renegade water users who refuse to comply with state law are all

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[33]*E. g., Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886); *Wasserburger v. Coffee*, 180 Neb. 149, 141 N. W. 2d 738 (1966).

[34]See Dunning, *The Significance of California's Public Trust Easement for California's Water Rights Law*, 14 U. Cal.-Davis L. Rev. 357 (1980).

[35]*E. g., United States v. Grand River Dam Authority*, 363 U. S. 229 (1960).

[36]See the authorities set out in notes 65 - 79 *infra*.

[37]*E. g., CF & I Steel Corp. v. Purgatoire River Water Cons. Dist.*, 183 Colo. 135, 515 P. 2d 456 (1973).

[38]*E. g., State ex rel. Reynolds v. South Springs Co.*, 80 N. M. 144, 452 P. 2d 478 (1969).

[39]*E. g., Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P. 2d 629 (1954).

[40]*E. g., Id.*

[41]*E. g., Basin Electric Power Cooperative v. State Board of Control*, 578 P. 2d 557 (Wyo. 1978).

[42]*E. g.*, Ariz. Rev. Stat. §§ 45-101 - 45-631 (1980) (Groundwater Code adopted in 1980).

too common. "Paper rights" in state offices are of no use if there is insufficient water in the watercourse. Comprehensive federal statutes, such as the Endangered Species Act, so important to Pyramid Lake,[43] have established new federal priorities outside of the state systems.[44]

A general stream adjudication is best viewed as an important foundation, a valuable but often rough statement of interrelating water rights in a drainage. The situation is constantly modified to meet different users, laws, and priorities, both old and new. All state administrators are familiar with, and well equipped to handle, this dynamic process. One aim of western water policy is certainty, and the general stream adjudication furthers that goal, but modern water resources demands are far too varied, pressing, and changing to allow for the kind of pure stability suggested by the states' briefs here. The accommodation of new uses is a way of life for state water administrators and the recognition of Indian water rights is just one of a continuing flow of adjustments that have been made, and will continue to be made, within existing management structures.

B. Private Water Users Can Accommodate the Court of Appeals Ruling by Eliminating the Waste of Water Through the Adoption of Water Conservation Methods.

The petitioners and the *amici* supporting them also argue that non-Indian water users have relied on the *Orr Ditch* decree and that their livelihoods will be affected by the recognition of the Tribe's water rights.[45] Nevada, for

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[43]See Endangered Species Act of 1973, 16 U. S. C. § 1531-43; *Carson-Truckee Water Cons. Dist. v. Watt*, 549 F. Supp. 704 (D. Nev. 1982).

[44]*E. g.*, Wild and Scenic Rivers Act of 1968, 16 U. S. C. § 1271-87.

[45]Of course, the existence and actual extent of tribal water rights for fisheries purposes cannot be determined until a trial is held on the merits of those issues.

example, argues that crops will be "dried up" and that whole communities will "diminish or vanish."[46]

These concerns are overdrawn because the Truckee-Carson Irrigation District is demonstrably a wasteful operation[47] that can continue to operate at approximately its current level of production after sound water conservation practices are adopted. Indeed, the *amici* states fail to advise the Court of the increasing number of progressive actions taken by their own state legislatures, courts, and administrators to effect good water conservation practices[48]—practices that, if enforced, provide the kind of flexibility that will allow adjustments by private users to account for the flow of water that should by right go to the Tribe and Pyramid Lake itself.

The need for water conservation traces to the fact that most land in the American West receives annual precipitation totalling less than 20 inches per year. This arid condition has played a central role in the society of the region since settlement began. The profound significance of water to the people of the West has long been recognized by a farsighted few like John Wesley Powell.[49] But it was not until recent years, generally since the early 1970's, that public awareness of water scarcity in the West escalated as population has boomed and as the prime sites for water storage have been taken up.[50]

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[46]Brief of Petitioner [State of Nevada], page 50. *See also, e. g.*, Brief of Petitioner Truckee-Carson Irrigation District, page 12.

[47]*Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257 (D. D. C. 1973), quoted in text at note 83, *infra*.

[48]See text at notes 59 - 79, *infra*.

[49]See *generally* Powell's report analyzing water scarcity in the "Great American Desert" west of the 100th Meridian, J. Powell, *Report on the Lands of the Arid Region of the United States*, Exec. Doc. No. 73, 45th Cong., 2d Sess. (1878).

[50]See, *e. g.*, Boslough, "Rationing a River — Everyone's Been Promised a Piece of the Colorado, But There's Not Enough

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Literally every comprehensive analysis of water policy has stressed the central importance of conserving water in resolving the West's water crisis.[51] Use of water by irrigators for agriculture holds special significance because so much water in the West is used for that purpose. Nationally, irrigation accounts for about 83% of all consumptive use and 35% of all withdrawals.[52] In the West, where almost 90% of all irrigation in the United States occurs, the figures are even more dramatic. In several western states irrigation exceeds or approaches 90% of all water withdrawals.[53]

Although irrigation efficiency has improved in some areas, outmoded and inefficient irrigation practices continue to result in massive waste of water. The primary causes are seepage from unlined irrigation canals, evaporation from open conveyancing systems, excessive application of irrigation water to fields, and evapotranspiration by phreatophytes.[54] One reliable authority estimates that

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to Go Around," Science '81 26 (June, 1981); Canby, "Our Most Precious Resource: Water," National Geographic 144 (August, 1980); P. Fradkin, *A River No More* (1981).

[51]See *generally* National Water Commission, *Water Policies for the Future* (1973); U. S. Dept. of Interior, *Westwide Study Report on Critical Water Problems Facing the Eleven Western States* (1975); Governor's Comm'n To Review California's Water Law, *Final Report* (1978); United States Water Resources Council, *The Nation's Water Resources* 1975-2000 (1979).

[52]National Water Commission, *supra* note 51, at 42.

[53]Westwide Study Report, *supra* note 51, at 46-47.

[54]See, e. g., U. S. Soil Conservation Service, *Crop Consumptive Irrigation Requirements and Irrigation Efficiency Coefficients for the United States* (Appendix to the National Analysis, Second National Water Assessment) (1976); U. S. Comptroller General, *More and Better Uses Could Be Made of Billions of Gallons of Water By Improving Irrigation Delivery Systems*

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total annual water waste due to irrigation amounts to 24 million acre feet per year.[55] Thus each year irrigators waste a quantity of water that is almost double the annual flow of the entire Colorado River and that exceeds the total volume of water consumed by all municipalities and industries in the nation.[56] Because of the high incidence of water use by western irrigators and because of widespread wasteful practices, irrigation in western states is variously described as being "a prime candidate for water conservation"[57] and as affording "the greatest potential, as well as the greatest need, for water savings."[58]

State legislatures have responded to the water crisis with a variety of reform measures. Water codes have been newly adopted or substantially revised in several states.[59] Most states now provide, contrary to the traditional approach under the prior appropriation doctrine, that a permit does not automatically issue if water is diverted and put to beneficial use; rather, state administrative agencies are authorized to deny the permit if issuance is contrary to the public interest.[60] Most states have now recognized recreation, wildlife, and other non-consumptive uses of water as beneficial uses.[61] A development of par-

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(GAO CED-77-117, Sept. 2, 1977); U. S. General Accounting Office, *Better Water Management Possible—But Constraints Need to be Overcome* (GAO CED-79-1, Oct. 31, 1978).

[55]U. S. Soil Conservation Service, *supra* note 54, at 17.

[56]National Water Commission, *supra* note 51, at 11.

[57]United States Water Resources Council, *supra* note 51, vol. 1, at 21.

[58]National Water Commission, *supra* note 51, at 299.

[59]*E. g.*, N. Dak. Cent. Code §§ 61-01—61-29 (1981) (adopted in 1979); Mont. Rev. Codes Ann., §§ 85-5-101—85-7-213 (1979) (adopted in 1973).

[60]*E. g.*, Nev. Rev. Stat. § 533.370 (1979).

[61]*E. g.*, Nev. Rev. Stat. § 533-030(2) (1979); Cal. Water Code § 1243 (West Supp. 1981); Mont. Rev. Codes Ann. § 85-2-102(2) (1979).

ticular importance is the movement in many western states to provide for minimum stream flows to assure that water will remain in water courses to protect instream values.[62] Further, the federal government has become increasingly active in water policy by adopting strong conservation statutes such as the Wild and Scenic Rivers Act of 1968,[63] the Endangered Species Act of 1973,[64] and the Clean Water Act of 1977.[65]

State courts have also rendered major opinions, especially during the last ten years, to enforce anti-waste and conservation requirements in state statutory schemes. The public trust doctrine has been invoked in North Dakota and elsewhere to promote careful water use.[66] In California, the Supreme Court has upheld broad state powers to regulate for conservation purposes in the face of claims by irrigators that unused riparian rights create vested property rights.[67] Statutes providing for forfeiture of water rights have been applied to water actually diverted, but wasted, so as to result in the forfeiture of wasted water.[68]

Perhaps the most significant advances in the state court opinions, however, have been in refining and harden-

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[62]*See generally* Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights,* 1978 Utah L. Rev. 211.

[63]See note 44 *supra.*

[64]See note 43 *supra.*

[65]33 U. S. C. A. § 1251-1376.

[66]*See, e. g., United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n,* 247 N. W. 2d 457 (N. D. 1976).

[67]*In re Waters of Long Valley Creek Stream System,* 25 Cal. 3d 339, 158 Cal. Rptr. 350, 595 P. 2d 656 (1979).

[68]*E. g., State v. McLean,* 62 N. M. 264, 308 P. 2d 983, 988-89 (1957).

ing the concept of beneficial use.[69] Modern courts, often looking to the increasing pressure on water supplies, have employed the law of beneficial use to prohibit all unreasonable waste, no matter how long-standing. This is an implicit rejection of the rulings in some older cases that an initial diversion of water, regardless of whether such use was wasteful, created a vested right that could not be altered by later conservation legislation or court decrees without effecting a fifth amendment taking.[70] Modern cases have rejected that notion in a number of contexts and have squarely recognized the principle that the beneficial use doctrine requires that there can be no vested right to unreasonable waste.[71] Decisions to that effect have been rendered in Idaho,[72] Wyoming, [73] Utah,[74] Ore-

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[69]Beneficial use has two components. First, it defines the types of permissible uses such as municipal, industrial, agricultural, and, in most states, recreational. Second, beneficial use requires that a water user may use only that amount of water reasonably necessary to carry out the beneficial purpose; that is, water may not be wasted. On the two elements of beneficial use, see 1 W. Hutchins, *Water Rights in the Nineteen Western States* 9-13 (1971). *See generally Schodde v. Twin Falls Land & Water Co.*, 224 U. S. 107 (1912), where this Court, applying Idaho law, refused to recognize a right to a diversion on the ground that it required an unreasonable amount of water.

[70]*E. g., Enterprise Irrigation Dist. v. Willis*, 135 Neb. 827, 284 N. W. 326 (1939). Cf., *State ex rel. Crowley v. District Court*, 108 Mont. 89, 88 P. 2d 23 (1939).

[71]*See generally* Note, *Water Waste—Ascertainment and Abatement*, 1973 Utah L. Rev. 449; Kramer & Turner, *Prevention of Waste or Unreasonable Use of Water: The California Experience*, 6 Agricultural L. J. 519 (1980); Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 Or. L. Rev. 483 (1982).

[72]*Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P. 2d 1029, 1032 (1972).

[73]*Basin Electric Power Coop. v. State Bd. of Control*, 578 P. 2d 557, 569-70 (Wyo. 1978).

[74]*See, e. g., In re Water Rights of Escalante Valley Drainage Area*, 10 Utah 2d 727, 348 P. 2d 679, 681-682 (1960).

gon,[75] Texas,[76] and California.[77] New Mexico[78] and Colorado[79] have both expressly adopted the doctrine of "maximum utilization."

The decisions of this Court have long refused to countenance waste in water projects.[80] This Term the

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[75]*Warner Valley Stock Co. v. Lynch*, 215 Or. 523, 336 P. 2d 884 (1959).

[76]*Lower Colorado River Authority v. Texas Dept. of Water Resources*, 638 S. W. 2d 557, 563 (Tex. Ct. App. 1982) ("[T]he holder of an appropriative right is limited not only to the exact quantification or volume stated in the certified filing or permit which evidences his right, but is also limited to the quantity or volume which is economically necessary for the purposes stated in his permit.").

[77]California courts, enforcing a constitutional provision against "waste or unreasonable use," Cal. Const., art. XIV, § 3, have held water users to a high standard of reasonableness. *E. g., Joslin v. Marin Municipal Water Dist.*, 67 Cal. 2d 132, 60 Cal. Rptr. 377, 429 P. 2d 889 (1967); *Erickson v. Queen Valley Ranch Co.*, 22 Cal. App. 3d 578, 99 Cal. Rptr. 446 (1971).

[78]*See, e. g., Kaiser Steel v. W. S. Ranch Co.*, 81 N. M. 414, 467 P. 2d 986, 989 (1970). ("Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress but for survival.") *See, also Jicarilla Apache Tribe v. United States*, 657 F. 2d 1126 (10th Cir. 1981).

[79]*See A-B Cattle Co. v. United States*, 196 Colo. 539, 589 P. 2d 57, 60 (1978) ("As administration of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.") (Emphasis in original). *See also Weibert v. Rothe Bros., Inc.*, 618 P. 2d 1367, 1372 (Colo. 1980) ("[T]here is read into every decree awarding priorities the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made, regardless of the fact that such limitation may be less than the decreed rate of diversion.").

[80]*E. g., Schodde v. Twin Falls Land & Water Co.*, 224 U. S. 107 (1912), discussed in note 69, *supra*.

Court, ruling on an equitable apportionment action involving the Vermejo River, held that it is appropriate to consider whether uses in one state are wasteful and whether those uses can be limited by reasonable conservation measures. *See Colorado v. New Mexico,* 103 S. Ct. 539 (1982). Collecting earlier authority on the subject, the opinion spoke directly to water waste and conservation in much the same terms as the state court decisions just discussed:

> Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are "reasonably acquired and applied." *Wyoming v. Colorado,* 259 U. S. 429, 484 (1922). Especially in those Western states where water is scarce, "[t]here must be no waste . . . of the 'treasure' of a river. . . . Only diligence and good faith will keep the privilege alive." *Washington v. Oregon,* 297 U. S. 517, 527 (1936). Thus, wasteful or inefficient uses will not be protected. *See ibid.; Nebraska v. Wyoming, supra,* at 618. Similarly, concededly senior water rights will be deemed forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence. *Washington v. Oregon,* 297 U. S., at 527-528 (1936); *Colorado v. Kansas,* 320 U. S. 383, 394 (1943). 103 S. Ct. at 546.

Further, this Court has made it clear that it will give broad leeway to state water conservation measures such as those discussed above. In *Sporhase v. Nebraska,* 102 S. Ct. 3456 (1982), the Court was forced to strike down a blanket ban on the interstate transport of groundwater to any other states that themselves prohibited out-of-state groundwater shipments. But the Court showed great, and proper, deference to true conservation measures: "We are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. . . . [A]

State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens . . . and not simply the health of its economy . . . is at the core of its police power." *Id.* at 3464.

These legal authorities suggest a different perspective on the equities raised on behalf of irrigators receiving water from the Truckee-Carson Irrigation District. The primary adjustment they would have to make to allow the preservation of Pyramid Lake is to cease their inefficient use of water—wasted water that they have been using as a matter of privilege, not of right. Further, these users and many others across the West have received subsidized reclamation water for decades,[81] often at the expense of Indians on the same waterways.[82] This water district, like many others, is operating an "antiquated system" that wastes water.[83] Since water is provided at a federally subsidized, below-market price there is little incentive to save it by utilizing modern technology. The subsidy ought not be compounded by allowing the artificially low cost of water to be used as an incentive for the continuation of outmoded and wasteful irrigation practices.

If the Court of Appeals' ruling is affirmed and Pyramid Lake is revived, irrigators of the Truckee-Carson Irrigation District will be forced to conform their water rights to the amount that they are legally entitled to use

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[81]See National Water Commission, *supra* note 51, at 145-47; 2 R. Clark, *Waters and Water Rights* 255-79 (1967); Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 Mich. L. Rev. 13 (1965); Ellis & DuMars, *The Two-Tiered Market in Western Water*, 57 Neb. L. Rev. 245 (1978).

[82]See National Water Commission, *supra* note 51 at 474-75.

[83]*Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257 (D. D. C. 1973). *See also* 128 Cong. Rec. S4826 (daily ed. May 11, 1982) (remarks of Sen. Laxalt).

beneficially. Water users, the State, and the United States can then take the necessary legal and technological steps to see that waste is eliminated, that good conservation practices are employed, and that water users in the District operate within the principle of beneficial use.

III. The Court of Appeals' decision will have little, if any, effect on other adjudications of Indian water rights.

The parties and several *amici* supporting them make much of how an affirmance of the Court of Appeals' ruling would cause the reopening of numerous other Indian water rights adjudications. They characterize the ruling as affecting farmers "throughout the West."[84] They warn that "the repose of long-established property rights and the economic survival in federal irrigation projects throughout the arid western states may be at stake,"[85] and go so far as to argue that "it is no exaggeration to state that should the Tribe's view prevail, those living in areas such as Phoenix should consider plans to return to the East from which their historical antecedents came."[86]

These fears are grossly overstated. The reopening of adjudications involving Indian water rights is not a West-wide issue for the simple reason that there are very few such adjudications. Indeed, there have been numerous calls for the adjudication of Indian water rights precisely because so few tribes have been included in existing ad-

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[84]Brief of Petitioner Truckee-Carson Irrigation District, page 48.

[85]Brief of Amicus Curiae Yakima Valley Canal Company *et al.*, page 2.

[86]Brief of Amici Curiae Salt River Project Agricultural Improvement and Power District, *et al.*, page 3.

judications.[87] A very small number of Indian water cases have been adjudicated in federal courts.[88] Indian water rights were barred from adjudication in state courts due to sovereign immunity defenses and lack of subject matter jurisdiction until the passage of the McCarran Amendment in 1952.[89] Since then final adjudications have been delayed by the inherent complexity of the proceedings.[90]

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[87]See, e. g., U. S. Comptroller General, General Accounting Office, *Reserved Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution: Report to Congress* (GAO CED-78-176, Nov. 16, 1978) ("Federal and Indian reserved water rights are a source of growing uncertainty and intensifying controversy in the Western States because the quantity and nature of such rights, with certain exceptions, have not been determined"); National Water Commission, note 51 *supra*, at 479-80 ("Most Indian water rights have not yet been adjudicated and therefore the dates of the rights and their quantities are not yet fixed in judicial decrees. . . . [However], the Indians unquestionably should be encouraged to make use of water that is legally as well as morally theirs."); Hickey, *Application of the Winters Doctrine: Quantification of the Madison Formation*, 21 S. D. L. Rev. 144, 145 (1976) ("Indian reserved water rights . . . [are] as yet untapped and unmeasured.").

[88]Two such proceedings, one in Washington and one in Arizona, are identified by *amici*. *See* notes 85 and 86, *supra*. *See also Arizona* v. *California*, 373 U. S. 546 (1963), decree entered, 376 U. S. 340 (1964), subsequent proceedings now pending in this Court; *United States* v. *Walker River Irrig. Dist.*, 104 F. 2d 334 (9th Cir. 1939); *United States* v. *Ahtanum Irrig. Dist.*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957); *United States* v. *Conrad Inv. Co.*, 156 F. 123 (C. C. D. Mont. 1907), aff'd, 161 F. 2d 829 (9th Cir. 1908); *United States* v. *Gila River Valley Irrig. Dist.*, Globe Equity No. 59 (D. Ariz. 1935). The most extensive survey of which we are aware is J. Folk-Williams, *Water in the West: What Indian Water Means to the West* (1982), published by Western Network in Santa Fe, New Mexico.

[89]43 U. S. C. § 666(a).

[90]Pending cases are collected in J. Folk-Williams, *supra* note 88.

Further, the precedential value of this case is limited by its setting. This Court can fairly structure a narrow ruling dealing only with this case's salient and unusual facts where: extensive valuable Indian water rights in trust were involved; the Indian right at issue was never expressly adjudicated; the government was representing directly competing dual interests; achieving the objectives of the non-Indian competing interest was the primary reason for initiating the litigation; achieving the conflicting objectives of the non-Indian competing interest was a primary reason that the Indian right at issue was not raised; neither the Indians nor the conflicting interest were parties of record; the Department of Interior, the Department of Justice, and the court itself knew of the Indian water right for fisheries purposes, yet all chose not to make the issue a matter of record or of adjudication; and importantly, the decree remains preclusive as to all parties to the original proceeding except as to the conflicting interest represented by the United States.

We appreciate that the few other tribes with existing adjudications may seek to bring themselves under the ruling that we recommend to the Court. Our response to that is direct. If any other Indian tribes can build a record with facts so compelling, and federal conduct so egregious, as the situation before this Court, then they too should not be precluded by res judicata. But think it inevitable that the effects of ruling to be very narrow, probably *sui generis*.

IV. Conclusion

In the largest sense, perhaps the truest guide for this case is *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), where this Court employed the public trust doc-

trine to allow Illinois to recall its grant of much of the Chicago Harbor to a railroad for private purposes. Both cases involve rigorous trust obligations. The cases are also similar because there, as here, the resources at issue are so extraordinary: "[The Chicago Harbor] is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly, if not quite, equal to the pier area along the waterfront of the city of New York." *Id.* at 454. The cases are alike, too, because the central question is the same: are we *sure* that the grant of the extraordinary trust resource has actually been intended by the entity with the power to make the grant? In *Illinois Central* the state legislature had made the grant, then revoked it, and the Court utilized the public trust doctrine to honor that revocation. We have no signal at all that Congress ever intended the grant of Pyramid Lake.

Illinois Central is on point in another crucial respect. The Court there was able to craft a narrow ruling that has remained narrow. States have developed the public trust doctrine in a variety of ways chosen by them[91] but in ninety years this Court has never based any decision on *Illinois Central*. The narrow reading has been made possible by the unique procedural context and the magnitude of the impact on a famous resource. Both apply here.

This is one of the great resource cases of our time—a rare instance in which the death of a large and wondrous place is at stake. For almost a century and a half visitors from John Charles Fremont to modern travellers in

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[91] *E. g.*, W. Rodgers, Environmental Law 170-86 (1977).

automobiles have come over ridges and caught their breath as they gazed down on an aquamarine sheet stretching out across the high pastel desert for nearly twenty-five miles. It is not the duty of this Court in the first instance to protect Pyramid Lake or its Indian people, future visitors, vistas, fish, or birds. That is for Congress. But this Court has few callings as high as to require that Congress and the *Orr Ditch* judge in fact ordered the demise of Pyramid Lake in some clear and certain way. If such a showing cannot be made, and we believe that it cannot, then the Court should affirm the carefully-drawn decision of the Court of Appeals.

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